

Blog Post

Employee Terminations: Breaking Up is Hard to Do

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Firing an employee can be much like breaking up with a significant other—stressful, messy, and awkward. No one wants to be the “bad guy,” and oftentimes it feels kinder to sugarcoat the facts rather than telling an employee the real reason for termination. But those good intentions may land employers in hot water.

A recent case serves as a potent reminder that an employer should always give the real reason or reasons for termination. As a result of failing to do so, a nonprofit recently lost an opportunity to toss out an age discrimination lawsuit filed by the organization’s founder, who alleged she was fired from her Executive Director position because of her age. She sued the nonprofit in federal court for age discrimination. The nonprofit denied that the founder’s age played any role in its decision to terminate her employment. Instead, the nonprofit argued in court that the founder was fired because of her “dictator” leadership style and her unprofessional conduct towards staff. The nonprofit had evidence to back up its assertions—including documented instances of her unprofessional behavior in a prior performance review and a “360-review” conducted by outside consultant, which included negative feedback from more than 80 employees of the organization.

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So why was documentation not enough to toss out the lawsuit? According to the federal court hearing the case, the problem was that other undisputed evidence showed the nonprofit's leadership failed to communicate these performance issues to the founder—perhaps in an effort to avoid an upsetting situation. For instance, the evidence shows that the nonprofit took no action after receiving the negative 360 review from the outside consultant. Not only was the founder kept in the dark about her performance issues, but the nonprofit's proffered reason for terminating her employment appeared to be inconsistent with comments made by the nonprofit's president. Specifically, during an in-person meeting with the founder, the nonprofit's president asked her about possibly retiring. In response, the founder asked if the president's question regarding her retirement was motivated by concerns with her performance as Executive Director. At the time of this meeting, the nonprofit had already conducted the 360-review highlighting her “unprofessional conduct, unsatisfactory performance as a leader, and financial discrepancies.” Nevertheless, the president *denied* that he asked about her retirement because of performance-related reasons. Instead, he said he was asking because “the board is ready to move on to the next generation of leadership.” In reviewing this evidence, the federal court acknowledged that the president may have made that statement to “temporarily shield]” the founder's feelings, but in doing so, “[the nonprofit's president] wandered into trouble.” The federal court determined that the president's “generation” statement was open to interpretation—one of which that could lead a reasonable jury to determine that the founder was fired because of her age and that the performance-related issues were pretextual. As a result, the federal court rejected the nonprofit's request to grant summary judgment in its favor, which allowed the plaintiff to proceed to take her case to trial.

This case should remind employers to exercise caution when terminating an individual's employment. Although employers should always strive to be courteous when notifying an employee of this difficult decision, employers should also be careful not to sugarcoat the facts simply to spare an employee's feelings.

Tips for Employers

- **Document and communicate.** This is especially true in the case of an employee with ongoing performance issues. This can be done informally (e.g. by saving e-mails indicating performance or conduct-related problems) or formally through write-ups. Keep in mind that employees who sue employers are often those who feel blindsided, (like the founder in the case above), so it is also important to communicate any problems to the employee as soon as they occur or shortly thereafter.
- **Keep “termination meetings” brief and simple.** These meetings can be nerve-wracking, and most likely, an employee will ask why he or she is being fired. For that reason, employers should have a short list of talking points prepared and stick to it. The more that is said during these meetings, the more likely that someone will make an off-script statement that can be open to interpretations—similar to that of the statement made by the nonprofit's president.
- **Give the real reason or reasons for the termination.** An employer need not identify every single action or omission that led to the termination, but the main reasons should be specifically referenced. Employers should not just put the “nicer” reason for separation. If an employee with an attendance problem also makes a lot of mistakes in performing his/her duties, at his or her job, then the employer should list both attendance and poor performance in the paperwork as the reasons for termination. Where the reasons are subjective (i.e, the employee repeatedly showed poor judgment, failed to be a

team player or was disruptive) include a specific example or two of each.

- **Be consistent.** Depending on the jurisdiction, some states require employers to provide employees with termination paperwork. If so, it is important for managers or HR professionals to make sure that the reason for termination jotted down in these documents is consistent with the reason communicated to the employee. If there are any inconsistencies, a court may interpret such inconsistencies as evidence of pretext, thereby making it harder for an employer to prevail in a wrongful termination lawsuit.
- **Try to preserve the employee's dignity where possible.** Employees who feel they were treated fairly rarely bring workplace claims against their employers. While it may not always be possible, deliver the news truthfully, but with compassion and understanding. If an employee recognizes that the company needs one set of skills and it's not the set the employee has, the company may still be able to leave the employee with his/her dignity intact.

Employers should keep in mind that there may also be other issues to consider when deciding to move forward with terminating an employee. For assistance with issues relating to employee discipline or termination, contact your Akerman attorney.

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